Supreme Court, U.S.
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No. 86-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY and PAULA JEANNE FELDMAN, as Personal Representative of the ESTATE OF ABRAHAM FELDMAN,

Petitioners,

v.

THE WESTERN UNION TELEGRAPH COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Western Union violate Section 2 of the Sherman Act when, in the process of withdrawing as the sole supplier of teletypewriter terminals to its Telex/TWX customers, it altered from time to time the amount of assistance its salesmen provided to other vendors?

RULE 28.1 LIST

The parent company of Respondent The Western Union Telegraph Company is Western Union Corporation. Respondent has no subsidiaries or affiliates to list pursuant to Rule 28.1.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent The Western Union Telegraph Company ("Western Union") respectfully requests that this Court deny the petition for a writ of certiorari.

The decision below involves the application of settled principles of antitrust law to particular facts. The reasoning and judgment of the Court of Appeals are entirely consistent with *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), to which the unanimous panel gave its "most careful and respectful consideration." (App. A at 12)[1] There is

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1 The Appendices to the Petition are cited as "App."; the Petition as "Pet."; the trial transcript as "T____"; plaintiffs' trial exhibits and defendant's trial exhibits as "PX____" and "DX____" respectively; and the Supplemental Appendix in the Court of Appeals as "SA____".

no conflict among the circuits or other reason for review by this Court.

COUNTERSTATEMENT OF THE CASE

At the start of 1973, Western Union owned two interconnected systems for sending messages, telex and TWX (hereafter, "telex"). Each system used teletypewriter terminals to send and receive typed messages over communications lines; each was "like telephone service except that the communications transmitted are messages rather than voice communications." (App. A at 2) Western Union leased to its customers all 90,000 terminals used on the telex network. Its business was regulated by the Federal Communications Commission ("FCC"), and under FCC-approved tariffs customers paid a single or "bundled" monthly charge covering both the terminals and "access line" service that enabled customers to send messages.

Western Union had decided, however, to start withdrawing from the terminal supply business so that its capital could be used in its communications network. Consistent with an emerging FCC policy in the telephone market,[2] Western Union announced in 1973 that it was opening the telex terminal market to competition. (App. A at 3) Western Union took several steps to implement this decision:

> It unbundled its pricing of service and equipment, told its subscribers they could cancel their existing leases of terminal equipment on 30 days notice and lease or buy such equipment from anyone they pleased, and told prospective vendors of such equipment that it would put them on a list which its salesmen would give new subscribers to telex service who were seeking terminals. Western Union even held a seminar for prospective vendors to encourage entry into the equipment market. Finally, it told its salesmen to try to sell its "installed base" of terminals—

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2 *See Carterfone*, 13 F.C.C.2d 420 (1968); App. A at 3, 8.

the 90,000 odd terminals that it owned and had leased to subscribers—to the lessees. (App. A at 3)

Western Union did not plan to purchase, and in fact did not purchase, any additional terminals after 1973. Although it intended to recycle terminals returned to its inventory when customers cancelled, all the net new terminal business resulting from growth in telex service would go to the vendors. As its terminals were sold, Western Union would also gradually be withdrawing from the terminal business. This is precisely what happened, as the undisputed statistics show.

TERMINALS IN USE ON TELEX

	Purchased from Western Union	Leased from Western Union	Purchased or Leased from Vendors
1973	2,982	92,413	537
1974	16,065	79,630	6,087
1975	24,462	69,343	11,826
1976	30,398	63,220	15,594
1977	32,491	60,527	20,755
1978	37,831	53,562	29,927
1979	39,087	53,090	36,942

Source: SA 243

In 1974, Western Union established a commission plan for its salesmen. Salesmen were paid the largest commission if they sold a Western Union terminal. If they were unable to make such a sale, the commissions they received for placing (by sale or lease) a vendor terminal, or for leasing a Western Union terminal, varied from time to time. When Western Union's inventory of terminals was low, salesmen were paid more for placing vendor terminals; when Western Union's inventory increased due to lease cancellations, salesmen were paid as much or more to place Western Union terminals.

WESTERN UNION COMMISSION PLAN

Date	Telex Points*			TWX Points*		
	Western Union Sale	Western Union Lease	Vendor Provided Terminal	Western Union Sale	Western Union Lease	Vendor Provided Terminal
Jan.-Apr. '74	9	5	6	9	5	6
Apr.-Dec. '74	9	5	7	9	5	9
Jan.-Apr. '75	14	6	6	15	7	7
Apr.-Sept. '75	13	5	9	15	6	11
Sept.-Dec. '75	15	7	7	19	10	10
Dec. '75	15	6	6	19	11	7

Sources: SA 437; PX 6; PX 313

* Each "point" equalled $10.00. (PX 240, at 1)

Thirteen vendors entered the market in 1973, and the number of vendors grew to 55 by 1975 and to over 120 by 1978. (T 5178) Petitioners (collectively, "Olympia") were one of the vendors who entered the market. Olympia was only a limited-function terminal supplier. It "relied on referrals from Western Union's salesmen—for Olympia had no sales force of its own, being a skeletal enterprise created largely for tax reasons." (App. A at 4) *Every order Olympia received was phoned into it by a Western Union salesman.* (T 1927)

On April 1, 1975, Western Union's inventory was low and, as shown above, it changed its commission payments to encourage salesmen to make greater efforts to place vendor terminals. (App. A at 4) In the months following this commission change, Olympia and other vendors experienced a substantial increase in terminal orders.

> [F]or a period of several months in 1975, when Western Union's schedule of sales commissions encouraged its salesmen to push independently supplied terminals and when these salesmen were routinely showing the list of

independent vendors to new telex subscribers, Olympia throve, installing 1,800 terminals—20 percent of all the telex terminals installed during this period. (App. A at 4)

The push given to vendor terminal placements, however, was greater than expected, and Western Union's own terminal inventory began to swell. On September 1, 1975, it "changed the schedule of commissions to encourage its salesmen to sell more Western Union terminals, and there is evidence that it also told the salesmen to stop showing the list of vendors to its subscribers." (App. A at 4) The effect of these actions can be seen in the following undisputed record statistics.

TERMINAL ORDERS

From New Telex Customers Only
January 1975-June 1976

Month	WU Sale	WU Lease	Olympia	Other Vendors
1/75	305	1237	75	328
2/75	314	1260	100	206
3/75	409	1659	125	318
4/75	256	699	325	806
5/75	222	579	325	892
6/75	212	412	325	895
7/75	172	616	400	871
8/75	168	367	425	1033
9/75	328	921	75	617
10/75	348	1076	0	565
11/75	391	749	0	395
12/75	449	862	0	346
1/76	289	664	70	331
2/76	333	803	0	552
3/76	404	1028	–	452
4/76	382	824	–	444
5/76	407	767	–	608
6/76	406	748	–	658

Sources: SA 3; T 755-56, 1363, 1375, 1385, 1447, 1457, 1898.

As the above figures show, there was a dramatic increase in the terminal orders of Olympia and other vendors in the April-August period, and a similarly dramatic drop in Western Union orders. Beginning in September, the situation reversed. As the Court of Appeals noted, "the roof caved in" for Olympia, which had depended on Western Union referrals for all of its business. (App. A at 4)[3] Other vendors, while not having as much business as in the boom summer months, "were able to hang on, as these figures show." (App. A at 4) Indeed, they increased their terminal orders over what they had enjoyed prior to April 1975. Overall, vendor terminal placements increased in 1975 and in each year thereafter, as shown on page 3, *supra*. Thus, Olympia's assertions that Western Union "close[d] the market" and that it "simply terminated" the vendor program (Pet. 6) are flatly refuted by the uncontroverted statistics in the record.

The figures given above are from contemporaneous Western Union records, were put in evidence by Olympia, and are uncontroverted. The figures confirm that Western Union sought only to recycle terminals to keep up with cancellations, altering the sales emphasis given to its own salesmen to accomplish that purpose. This was not an exact science. The commission incentives from April through August 1975 caused salesmen to overpromote vendor terminals, resulting in a bulge in Western Union's inventory. In September, Western Union tried to correct the imbalance by increasing the emphasis on placing its own terminals. But it is indisputable that Western

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3 Olympia seeks to attribute its brief success in the spring and summer of 1975 to lower prices and better quality terminals. (Pet. 5) However, its monthly rental charges for the same model machine were only marginally lower than Western Union's: $55.00 versus $56.50 for telex terminals and $65.00 versus $69.00 for TWX terminals through most of 1975. (PX 16; PX 298; DX 1238) Morever, Western Union offered customers the option of purchasing terminals or renting them on a 30-day lease. After September 1, 1975, Olympia terminals were available only by lease and for a minimum term of one year. Obviously many customers would prefer Western Union's shorter lease term as well as dealing with "an established firm such as Western Union." (App. A at 15)

Union never did more than attempt to protect itself from stagnant inventories, while steadily reducing its role as a terminal supplier.

The only conduct alleged against Western Union was its reduction in sales assistance to its competitors. There was no evidence of any exclusionary conduct on its part.[4] As the Court of Appeals stated:

> All Western did in this case to "obstruct" Olympia from competing with it in the sale or lease of telex terminal equipment was to stop making referrals to Olympia. . . . Olympia remained free to compete by sending salesmen to call on Western Union's subscribers. This was not an illusory freedom. Firms better established than Olympia—firms that had their own sales forces—weathered the withdrawal of the vendor list. Western Union stopped helping Olympia but did not hinder it. (App. A at 16)

I.

THE DECISION BELOW IS ENTIRELY CONSISTENT WITH SETTLED LAW

A

The Court of Appeals correctly held that the conduct charged against Western Union—the failure to continue to help market Olympia's terminals—was not "exclusionary" within the meaning of the antitrust laws, and that there was no antitrust violation when Western Union reduced its sales assis-

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4 In response to an Olympia sales brochure critical of Western Union's service, a regional vice-president wrote a memo in January 1976—some months after the fall-off in Olympia's business—suggesting that "[t]hese turkeys . . . ought to be flushed" from the vendor list. However, "nothing was done, or had to be done." (App. A at 5) Western Union's counsel advised that, so long as a vendor remained capable of supplying terminals, there was no basis for removing him from the list. (SA 16) Olympia thus remained on the vendor list.

tance to Olympia after the summer bulge developed in its own terminal inventory. This ruling fully comports with prevailing law. Federal courts have consistently held that a monopolist is not required to sell products for its competitors. *E.g.*, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 744 (9th Cir. 1979); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 543 F. Supp. 1255, 1266-67, 1269 (W.D. La. 1982), *aff'd*, 725 F.2d 300, 304 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984). The antitrust laws expect competitors to "make their own way in the market, by advertising or other means of promotion" (App. A at 13); Olympia had no right under the antitrust laws to "take a free ride on its competitor's sales force." (App. A at 14)

B

The decision below is entirely consistent with *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Olympia's argument to the contrary is based on mischaracterizations of the Court of Appeals' opinion, and an attempt to divorce particular phrases in the opinion from the factual context in which they were made.

In *Aspen*, rival ski companies had for 15 years sold a joint lift ticket that could be used on any of four mountains. *Id.* at 591. After one firm (Ski Co.) acquired three of the four mountains, it refused to participate in a joint ticket unless its smaller rival (Highlands) accepted a smaller share of the revenues. When Highlands refused, Ski Co. terminated the joint ticket. In addition, Ski Co. engaged in affirmative conduct to obstruct Highlands when it tried to offer a substitute ticket package of its own, including refusing to sell lift tickets to Highlands at regular prices and refusing to accept cash equivalent vouchers that skiers obtained from Highlands and presented to Ski Co. *Id.* at 593-4.

Aspen thus presented a situation where (*i*) a monopolist, Ski Co., terminated a long-standing joint lift ticket that had

developed in a competitive market and that was a customary "product" in other multimountain ski areas, 472 U.S. at 603 & n.30, (*ii*) thereby making it impossible for Highlands to offer a substitute, *id.* at 594, 608, and (*iii*) without offering any "valid business reasons" for its conduct. *Id.* at 605. Moreover, Ski Co. engaged in affirmatively exclusionary behavior that confirmed its goal of "reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id.* at 608. In each of these crucial respects, the present case clearly differs from *Aspen* and the Court of Appeals so held.

First, the joint ticket in *Aspen* "had originated in a competitive market," had "persisted" for several years, and was prevalent in "other multimountain areas which apparently are competitive." *Id.* at 603. In short, a joint ticket was the competitive norm. This Court explained that " 'patterns of distribution' " which " 'develop and persist' " in a competitive market are presumptively "more efficient." *Id.* at 604 n.31. Ski Co.'s termination of the joint ticket was therefore a disruption in the competitive norm.

By contrast, Western Union's assistance to its competitors was "not a form of cooperation commonly found in competitive markets; it is the antithesis of competition." (App. A at 14) The reduction in Western Union's assistance to Olympia was therefore not the kind of deviation from the competitive norm that occurred when Ski Co. blocked the continuance of the joint ticket in *Aspen*.

Second, Ski Co.'s termination of the joint ticket left Highlands unable to offer a substitute. "Without a convenient all-Aspen ticket, Highlands basically 'becomes a day ski area in a destination resort.' " 472 U.S. at 594. Although Highlands "could not acquire three more mountains in the Aspen area in order to be able to compete more effectively" with Ski Co., Olympia most assuredly "could and did hire salesmen to substitute for the Western Union sales force that had been helping it." (App. A at 13-14) Nothing stopped vendors from

making their own way in the market; many vendors did so even after Olympia failed, as the undisputed record statistics show.[5]

Third, the Supreme Court in *Aspen* found it "most significant" that Ski Co.'s conduct could not be justified by "any normal business purpose." 472 U.S. at 608. By contrast, Western Union's conduct had a perfectly valid business purpose—to reduce an inventory bulge that its own salesmen had created by pushing vendor terminals. The Court of Appeals expressly relied on this "clear business justification." (App. A at 14) On this ground alone, *Aspen* is distinguishable. *Accord: Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1471 (1986) (applying *Aspen*, court rejects monopolization claim where business justifications "appear valid").

Olympia plainly misreads *Aspen* on this point by asserting that Ski Co. too sought to increase its sales. (Pet. 21) In fact, this Court squarely stated that "Ski Co. was apparently willing to *forgo daily ticket sales* both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk." 472 U.S. at 608 (emphasis added). Ski Co. therefore "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-11. In contrast, Western Union sought only to keep its existing inventory in service as it gradually reduced its role as a terminal supplier. This was normal and efficient business behavior, in a context where no

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5 Indeed, a widely available Western Union directory, distributed to every Telex subscriber, listed each subscriber. (T 1257-58) Vendors could and did contact such subscribers. (T 2127, 4374; SA 39) The directory also contained advertisements and a "yellow pages" listing of vendors, including Olympia's marketing company, Dal-Data. (SA 353A, 346-56; DX 882) It is obvious that vendors would not have paid for such advertising if, as Olympia suggests, customers were unlikely to switch terminals. They could easily do so because of the 30-day Western Union leases, and might be expected to do so if, as Olympia claims, its terminals were better and cheaper.

short-term or long-term impairment of competition was intended or produced.

Finally, Ski Co.'s refusal to sell lift tickets to Highlands at regular prices and to honor cash equivalent vouchers that skiers obtained from Highlands, all so that Highlands could not develop an alternative ticket package of its own, 472 U.S. at 593, was exclusionary in a classic sense. By contrast, Western Union took *no* steps to exclude or obstruct competing vendors. Moreover, in contrast to the defendant in *Aspen*, Western Union had itself taken numerous steps to foster competition and had chosen in the long run to withdraw from, not dominate, the market.

Olympia attempts to manufacture a conflict between the Court of Appeals' opinion and *Aspen* by repeatedly mischaracterizing the opinion. For example, Olympia accuses the Court of Appeals of announcing a broad "exculpatory rule" at odds with *Aspen*. (Pet. 9-13) However, the Court of Appeals' conclusions as to Western Union's lack of duty to assist a competitor clearly and explicitly rested on the nature of the assistance involved in this case, on the history of the market, on the ability of other vendors to compete, and on other indisputable facts. As the panel noted on rehearing:

> The relevant factual differences [between *Aspen* and *Olympia*] are not the differences between snow and teletype or between a mountain and a piece of paper; they are differences in competitive history and circumstances, conditions of entry, etc., which enabled a rational jury to infer that Aspen Skiing was engaged in anticompetitive conduct, but would not enable a rational jury to infer that Western Union was so engaged. On the facts summarized above and in the panel opinion, facts which are either undisputed or indisputable on the record, we do not see how section 2 of the Sherman Act could be construed to supply Olympia with a claim for relief, unless there is a general principle of antitrust law that a competitor is entitled to the assistance, in selling its product, of any

> firm in its market that happens to have monopoly power. A monopolist is not required to subsidize its competitors by doing their selling for them—Olympia's essential claim. We do not read *Aspen* to establish such an entitlement under antitrust law. (App. B at 28)

Nor does the decision below seek to restrict *Aspen* to the "essential-facility" doctrine. (Pet. 14-16) The Court of Appeals expressly differentiated the essential facility cases from *Aspen* while nonetheless noting similarities between the cases. *See* App. A at 13 (*Aspen* is *not* a conventional essential facility case like *Otter Tail*, although it is "like the essential-facility cases" in one respect).

Olympia is also plainly wrong in suggesting that the Court of Appeals engaged in *de novo* fact finding. (Pet. 16-23) The court relied on undisputed record facts and stated them "as favorably to Olympia as the record permits, in view of the jury's verdict." (App. A at 2) Olympia's inflammatory rhetoric repeatedly flounders when juxtaposed with undisputed and incontrovertible evidence. For example, Olympia states that Western Union "close[d] the market" by its purported "termination" of the vendor program in September 1975 and that "[p]lacements by other vendors went to practically nothing." (Pet. 6-7) Yet the record of actual terminal orders shows that other vendors continued to compete and, indeed, that they continued to capture a larger share of the market in each year after 1973. Similarly, while Olympia premises its argument on the assumption that other vendors "could not effectively compete" (Pet. 6), the record of other vendor placements shows that they did.[6]

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6 Nor did the Court of Appeals engage in *de novo* fact finding as to damages when it ruled, alternatively, that the damage judgment was speculative and unsupportable. That alternative ruling was based on Olympia's own damage documents and on its counsel's statements at oral argument as to the "present value" of allegedly lost profits. The Court of Appeals' observations on these issues do not merit review by this Court.

C

Olympia suggests that the "integrity of the judicial system" and the very future of antitrust law hinge upon the outcome of this case. (Pet. 25-27) Such hyperbole cannot mask the much simpler truth: the decision below involves the application of settled legal principles to a particular factual setting. Indeed, this case involves the extraordinary situation of a monopolist that voluntarily took steps to introduce and facilitate competition (App. A at 8) and whose "long-run design" is to exit the market. (App. A at 15) Viewed against this factual backdrop, it would have been particularly perverse to find a violation of the Sherman Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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